FILED
JUN 18 1953

IN THE

Supreme Court of the United States

October Term 1952 No. 82

WILLIAM B. PORTNER, *Petitioner*,

v.

CENTRAL-PENN NATIONAL BANK OF PHILADELPHIA, *Respondent*.

Brief for Respondent Contra Petition for Writ of Certiorari

IRA JEWELL WILLIAMS,
THOMAS RAEBURN WHITE,
JOSEPH W. HENDERSON,
IRA JEWELL WILLIAMS, JR.,
W. WILSON WHITE,
Attorneys for Respondent.

The Legal Intelligencer, 10 S. 37th St., Phila.

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Brief for Respondent Contra Petition for Writ of Certiorari

STATEMENT OF THE MATTER INVOLVED

The following chronology of the (here) undisputed facts gives the gist of the controversy:

On November 29, 1951, the directors of the respondent National Bank and another National Bank agreed to consolidate under the name and charter of the respondent pursuant to the then existing provisions of the National Bank Consolidation Act of 1918 (12 U. S. C. A. §33).

That day and the next the Philadelphia newspapers published news stories of the agreement (R. 8, 9, 28).

Advertisement of the agreement was duly published every week-day for the four consecutive weeks beginning December 3, 1951 (R. 10).

On December 12, 1951, all of respondent's shareholders of record were sent due notice of a Shareholders' Meeting, to be held January 15, 1952, for ratification of the consolidation.

On or about January 4, 1952, petitioner bought 300 shares of respondent's capital stock, with full knowledge of the pending ratification meeting (R. 28, 29) —

> "for the sole purpose of dissenting from the proposed consolidation . . . in order to receive as the appraised value of the stock a sum substantially in excess of its market value and in excess of the price paid by him." (R. 29)

After having "dissented" from the consolidation, which was duly approved by the shareholders and the Comptroller of the Currency, and carried out, petitioner demanded an appraisal of his 300 shares as a "dissenting shareholder." This had been his purpose all along.

Respondent sought a declaratory judgment that petitioner was not entitled to such an appraisal. The District Court dismissed the complaint on motion.

In reversing the judgment of dismissal the judges of the Court of Appeals agreed that upon the facts admitted in that stage of the proceedings petitioner was not within the Congressional intent. Judges Biggs and Goodrich so held because petitioner's "dissent was a mere pretense, and such pretense does not entitle the shareholder to the benefit of the statute." (R. 30-31) Judge Staley concurred

on the ground that the statute "indicates that the appraisal provisions are open only to those who are shareholders at the time the consolidation agreement is promulgated by the directors, for they are the only ones who have a choice thrust upon them." (R. 32) The case was remanded for trial.

While the appeal in the court below was pending, Congress amended the Consolidation Act to eliminate any appraisal right on the part of shareholders of a receiving bank in a merger (Act of July 14, 1952, P. L. 530). Controversies between a receiving bank, as the respondent was in this case, and its shareholders were thereafter foreclosed.

QUESTION PRESENTED

Was it error for the court below to order trial of the issue as to whether petitioner was entitled to exercise appraisal rights as a dissenting shareholder under the National Bank Consolidation Act before its amendment, where on the facts admitted in that court petitioner's "dissent" was only a pretense?

REASONS FOR DENYING THE WRIT

1. The question at issue is not one of gravity or general importance, but concerns only the individual interest of the petitioner.

2. The decision will have no future application, since the amendment of the statute during the pendency of this case forecloses further litigation of the question.

3. The judgment of the court below is not final.

ARGUMENT

1. The Question is Not One of Gravity or General Importance

This case deals exclusively with the examination of facts determinative of whether petitioner was a "dissenting shareholder." The court below found the necessary conclusion from the admitted facts to be that petitioner did not in fact dissent from the consolidation. This conclusion is inescapable: on the record before the courts below petitioner conceded that he bought respondent's stock for the sole purpose of profiting through *consummation* of the consolidation; it was properly held that his "dissent" was mere pretense. That is the case in its entirety.

This Court will not review a case, however important it may be to the petitioner, if "the question involved is not one of gravity and general importance:" *Fields v. United States*, 205 U. S. 292, 296 (1907). The failure of petitioner's scheme is important only to him.

2. The Decision Will Have No Future Application

By the amendment of the Consolidation Act of July 14, 1952, P. L. 530, Congress saw fit to deny the appraisal right to shareholders of the "receiving bank" in mergers consummated thereafter. Respondent was the "receiving bank" in the transaction *sub judice* (R. 28). Hence no future case presenting this precise question is foreseeable, and the decision in the case at bar is limited to the single controversy embraced in it under the settled doctrine that,

where change of law has occurred in the course of a case, the Court will not in that case decide rules of law for the government of future cases *(United States v. Alaska S. S. Co.*, 253 U. S. 113 (1920), and cases cited). The change of law has made this case of no more than individual concern. *Cf. Calmar Steamship Corp. v. Scott*, 345 U. S. 427, 428 (1953).

3. The Judgment is Not Final

The judgment of the court below reverses dismissal of the complaint, reinstates the complaint, and orders the trial court to proceed (R. 31). The entire case hinges on the ultimate determination of the facts. In the court below all averments of the complaint were treated as true. The issue at trial is the truth of petitioner's averment that he "dissented." Said the court below: "But if the allegations of the complaint be true this was not the fact" (R. 30). The judgment is not final, and this fact "of itself alone" furnishes sufficient ground for denial of the writ: *Hamilton Shoe Co. v. Wolf Brothers*, 240 U. S. 251, 258 (1916). The case is clearly not within the exceptions of *United States v. General Motors*, 323 U. S. 373 (1945), or *Land v. Dollar*, 330 U. S. 731, cited by petitioner. In both an important constitutional or public question, fundamental to the conduct of the case, had been decided by the court below. In neither would a trial have thrown any further light on the questions to be reviewed.

Petitioner insists that the trial of the case as ordered will involve too subjective an inquiry — into petitioner's "motives or hidden sentiments" — and that this Court should disapprove a venture into such area of search. If

petitioner were correct, neither the criminal law nor the law of fraud could be enforced. In both, intent and motive may be decisive and must be determined. The judicial process has never met real difficulty in ascertaining motive or intent. See *Castle v. Bullard*, 23 How. 172, 186 (1859); *Butler v. Watkins*, 13 Wall. 454, 464 (1871). "That actions speak louder than words is sound law as well as proverbial wisdom." (Mitchell, J. in *Graham v. Dempsey*, 169 Pa. 460, 462 (1895).

It is clear from the record that petitioner's actions were so conceived and executed as to leave the ascertainment of his motive a matter of no difficulty. But the difficulty in searching out facts, if any there be, is "a task primarily for a court of one judge, not for a court of nine": *Kennedy v. Silas Mason Co.*, 334 U. S. 249, 256 (1948).

The petition should be denied.

Respectfully submitted,

IRA JEWELL WILLIAMS,
THOMAS RAEBURN WHITE,
JOSEPH W. HENDERSON,
IRA JEWELL WILLIAMS, JR.,
W. WILSON WHITE,
Attorneys for Respondent.